[illegible]

122 I.A.2 27

ABST.

52955

PEOPLE OF THE STATE OF ILLINOIS, Appellee,

v.

SANFORD AMSTERDAM, Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

Honorable Jacques F. Heilingoetter, Presiding.

MR. JUSTICE DRUCKER DELIVERED THE OPINION OF THE COURT.

On his plea of guilty to the charges of conspiracy and theft under Chapter 38, Sections 8-2, 16-1(b) and 16-1(a) of the Illinois Revised Statutes (1963), defendant was sentenced to a term of one to four years on each of four indictments to run concurrently with a five year sentence entered on February 21, 1967, in the United States District Court for the Southern District of Iowa.

On June 25, 1969, the attorney appointed by the trial court to represent defendant on appeal filed a petition to withdraw from the case as he was unable to find any legal points which were arguable on their merits. He also filed a brief, covering possible issues, in compliance with Anders v. California, 386 U. S. 738. Copies of the petition and brief were served by mail upon the defendant in the Terre Haute Federal Penitentiary, Terre Haute, Indiana, on July 2, 1969. He was also notified that he might have until September 23, 1969, to file any points he might choose in support of his appeal. Defendant requested additional time to answer and he was granted extensions which expired on February 6, 1970. However, we have not received any further communication from him.

Counsel's brief covers the possible point that the trial court did not fully admonish the defendant as to the significance and consequences of his change of plea from not guilty to guilty.

On December 8, 1965, the defendant was arraigned and a plea of not guilty was entered, defendant being represented by private counsel. He was then furnished with the names and addresses of the State's witnesses.

After repeated continuances, the case came up for trial on April 3, 1967, at which time the following colloquy took place:

> THE COURT: First, will we accept the guilty pleas? This is what their intention is? Is this correct, Mr. Amsterdam, you are changing your plea to guilty?
>
> THE DEFENDANT AMSTERDAM: That is correct, your Honor.
>
> THE COURT: Mr. Laskey?
>
> THE DEFENDANT LASKEY: Yes, sir.
>
> THE COURT: You both understand by doing this you automatically waive your right to a jury trial?
>
> THE DEFENDANT LASKEY: Yes, sir.
>
> THE COURT: Mr. Amsterdam?
>
> THE DEFENDANT AMSTERDAM: I understand.
>
> THE COURT: You understand also under the facts of this indictment you may be sentenced to the penitentiary anywhere from one to ten years. Knowing this, do you still persist in guilty pleas?
>
> THE DEFENDANT LASKEY: Yes, sir.
>
> THE COURT: Mr. Amsterdam?
>
> THE DEFENDANT AMSTERDAM: Yes, sir.
>
> THE COURT: The record shows the defendants have been advised of the consequences of their pleas. After being so advised they persist in their pleas. The pleas, therefore, will be accepted, and there will be a finding of guilty in manner and form as charged in the indictments, judgments entered on the findings.

On August 12, 1967, defendant was sentenced from one to four years in the Illinois State Penitentiary on each of the four indictments, the sentences to run concurrently, and also

to run concurrently with a federal sentence of five years.

To the point raised in defense counsel's brief the following are pertinent:

> The Code of Criminal Procedure, Section 115-2 (Ill. Rev. Stat. (1967), ch. 38, § 115-2):
>
> <u>Pleas of Guilty</u>. (a) Before or during trial a plea of guilty may be accepted when:
>
> (1) The defendant enters a plea of guilty in open court;
>
> (2) The court has informed the defendant of the consequences of his plea and of the maximum penalty provided by law which may be imposed upon acceptance of such plea.
>
> Supreme Court Rule 401(b) (36 Ill. 2d 167; Ill. Rev. Stat. (1967), ch. 110A, § 401(b)):
>
> (b) <u>Procedure on Plea or Waiver</u>. The court shall not permit a plea of guilty or waiver of indictment or of counsel by any person accused of a crime for which, upon conviction, the punishment may be imprisonment in the penitentiary, unless the court finds from proceedings had in open court at the time waiver is sought to be made or plea of guilty entered, or both, as the case may be, that the accused understands . . . the nature of the charge against him, and the consequences thereof if found guilty, ... The inquiries of the court, and the answers of the accused to determine whether he . . . comprehends the nature of the crime with which he is charged and the punishment thereof fixed by law, shall be taken and transcribed and filed in the case . . . .

Several cases have considered these requirements. <u>People v. Mims</u>, 42 Ill. 2d 441; <u>People v. Ballheimer</u>, 37 Ill. 2d 24; <u>People v. Kontopoulos</u>, 26 Ill. 2d 388; and <u>People v. Doyle</u>, 20 Ill. 2d 163. See also <u>Boykin v. Alabama</u>, 395 U.S. 238, dealing with the necessity of an affirmative showing in the record that petitioner's guilty plea was intelligently and voluntarily made.

We conclude that there was a full compliance by the court with the necessary questioning of this defendant as called for

by the statute, the rule and the cases.

Furthermore, we have made "a full examination of all the proceedings" as required by _Anders_, in addition to reviewing the brief filed by defense counsel.

We find that there are no legal points "arguable on their merits" and that the appeal is "wholly frivolous." _Anders_, _supra_. Defendant's attorney is given leave to withdraw, and the judgment of the Circuit Court is affirmed.

AFFIRMED

English and Leighton, JJ., concur.

(Abstract only.)

69-131

122 p.126

122 I.A.2 126

UNITED STATES OF AMERICA

ABST.

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 1st day of December, in the year of our Lord one thousand nine hundred and sixty-nine, within and for the Second District of Illinois:

Present -- Honorable MEL ABRAHAMSON, Acting Presiding Justice
Honorable GLENN K. SEIDENFELD, Justice
Honorable THOMAS J. MORAN, Justice
HOWARD K. KELLETT, Clerk
HARRY E. BOOTH, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On April 9, 1970 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

FILED

APR 9 1970

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

No. 69-131

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. PAUL MILLER and ROCCO CIRCELLI, Defendants-Appellants.	Appeal from the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois

---

MR. JUSTICE SEIDENFELD DELIVERED THE OPINION OF THE COURT:

Paul Miller and Rocco Circelli, defendants, were indicted for Burglary (Ill. Rev. Stat. 1967, Ch. 38, Sec. 19-1(a)), together with one Stephen B. Bigley, whose case was severed for trial. Both defendants were convicted after a joint bench trial. Defendant Circelli was sentenced to an indeterminate term of 18 months to 6 years. Defendant Miller was sentenced to an indeterminate term of 3 to 6 years.

Defendants urge that they were not proven guilty beyond a reasonable doubt and particularly challenge the reliability of identification testimony, and the court's evidentiary rulings. Defendant Circelli, additionally, claims an abuse of discretion in denial of probation to him.

The indictment charged the unauthorized entry into the building of George Gunderson with intent to commit a theft, on November 11th, 1968.

Thomas Clegg testified for the State, relating that he was in the home of a friend, Linda Anderson, about 3:00 P.M. on November 11th. The Anderson home was located to the west of the Gunderson home, separated by a vacant lot, which was covered with thin weeds. Through a living room window facing the Gunderson home, Clegg observed two males in the vacant lot, one crouched on one knee, the other standing but bent down, both facing in the direction of the Gunderson home. Both males, who appeared to be about 19 years old, were dressed in dark clothing and wore black jackets which appeared to be leather. They moved gradually toward the Gunderson home. The witness called Mrs. Anderson, Linda's mother, into the room. She went into the kitchen to telephone and called the police. Clegg was 40 feet or possibly more from the two men when he first saw them. He saw their faces and identified the two defendants in court as the same persons he saw on November 11th.

Clegg then left the home and observed an unoccupied Green 1969 Buick Electra parked between the Anderson and Gunderson homes. While he was at the car a police squad arrived. At this time he saw three persons running in the back yards of the homes, coming around the Anderson home. He didn't see their faces but two had the same dark clothing he had seen earlier. He ran over to where Linda Anderson was in the back yard at this time and saw two people run around the Anderson home and up the street in an easterly direction. He chased them but they got away.

On cross-examination, he stated that he had not been asked to identify the defendants until his court appearance.

Linda Anderson testified to essentially the same observations, and identified the two men she saw as the defendants. She saw the two men run to the back of the Gunderson home. They had dark clothing. When Clegg left the house she saw one boy run from the rear

of her home and one run from the vacant lot. The police arrived 10 or 15 minutes later. Shortly thereafter she saw three boys run from the rear of the Gunderson home, running south. Of these three, she recognized the two men she had seen earlier. She then ran out of the home and saw two men in front of the Burk home, that of a neighbor. These men ran to the Burk's rear yard and at that time she was 10 to 15 feet away from them. They were the two defendants whom she had previously seen in the vacant lot and had identified in court. They had dark hair, but Miller's hair appeared light brown.

A third man, taller than the others, and with light hair, came up from behind her and passed her, running. Thomas Clegg had passed her just before.

On cross-examination, she identified a courtroom spectator as one of the policemen she saw on November 11th, or "some boy who looked like him". She said Miller's hair appeared light brown in comparison to Circelli, but she considered both to have dark hair. She was not asked to view any of the defendants prior to the hearing.

Mrs. Warren Anderson gave similar testimony to that of her daughter and Thomas Clegg as to what she observed from her window. However, she saw only the profile of the two in the lot, from a distance of 30 feet. She described their clothing as dark. Initially she said both men had "beautiful black" hair, but on later examination characterized the color as "dark". She conceded that Miller's hair, as she viewed it in court, was not black. She identified defendant Circelli as one of the two she had seen in profile in the lot, but could not identify the defendant Miller. She had not previously been asked for an identification.

Mrs. Dorothy Burk testified that she observed two boys in the street at the end of her driveway, walk down her driveway to the back of her home, passing within three feet of her as she looked out the window. She came out on her patio and when 10 to 12 feet away from them asked them what they wanted. They were wearing dark clothes. They did not answer. She saw their faces and they turned and ran. She identified defendant Miller as one of the boys but could not be positive as to the other. A third boy had run passed her quickly. She testified that Linda was chasing the two boys and the third was behind her running in the same direction. She could not recognize the profiles of the defendants present in court.

A neighbor, Bruce Hedmark, testified that he had seen the Buick Electra drive up and that it contained three boys who were either teenagers or in their twenties. Later he observed three males running from the back of the Gunderson home. Shortly thereafter he joined Linda Anderson and Thomas Clegg in pursuit of two men, one of whom he positively identified as Circelli.

Hedmark had attended a line-up (the record does not indicate whether Miller was present). He was unable to identify Miller in court. He stated that his in court identification of Circelli was made totally independent of the line-up.

Frank Acton was driving to Bruce Hedmark's home when he observed two men running down the street, being chased by Bruce. They both had dark clothing. He came as close as 15 to 20 feet from them. They were 19 or 20 years old and had dark hair. He identified Circelli as one of the men, but answered "I can't say", with reference to Miller. He had attended a line-up and had identified two men there. (Again without a record of whether Miller was present.) He testified that his in court identification was not dependent upon the line-up.

Further evidence introduced on behalf of the State, established the Buick Electra as owned by Stephen Bigley's mother; that Bigley's fingerprints were found in the Gunderson home in several places including a storm door broken on the day of the burglary. There was evidence of ransacked drawers and furs stuffed in a pillow case in the Gunderson home, although nothing had been removed from the home. Miller's fingerprint was found in the Buick Electra which was left at the scene.

There was also evidence introduced by the State that Bigley and Circelli were arrested in Miller's apartment some three hours after the burglary.

Defendant Paul Miller testified in his own defense that he had been at his brother's house from 11:00 A.M. on November 11th to 3:15 or 3:20 P.M. while his brother was repairing his car. He then went to his girl friend's house where he remained until 8:30 when he was taken to his apartment where he was arrested. His brother and one Barbara Domingo, his girl friend, corroborated his testimony.

Defendant Rocco Circelli also testified in his own behalf. He said that he was in the vacant lot next to the Gunderson home on the afternoon of November 11th with a friend, Joseph Cantore. They were crouched down looking for rabbit dens and he blew off a firecracker in one of the holes.

He heard someone say "catch him" or "chase him", and walked to the rear of the Gunderson home where he saw someone come out of the building. He described the man as having blonde hair, and said he was running. He ran, too. He thought he was being chased because "we were blowing off firecrackers" and had more in their possession. He did not know the lad who ran out of the Gunderson home.

He further testified that Cantore was dark haired and looked like himself, Circelli. Cantore was in the army and could not be here for court.

On cross-examination, defendant Circelli said he had not ever gone with Cantore to his attorney's office. He did not see Stephen Bigley or Paul Miller at the scene. He didn't see Bigley's car in the area. Later his mother took him to Paul Miller's apartment where he was intending to visit. Bigley was there but Miller was not.

We first consider the contention of defendant Miller that his identification was inherently insufficient and also constitutionally impermissible because the record does not show he was present at a line-up.

There is no requirement that a line-up must be conducted. The fact that an accused is not selected from a group does not render evidence of identification incompetent, but only affects its weight. The People v. Brinkley, 33 Ill. 2d 403, 406 (1965); The People v. Macias, 39 Ill. 2d 208, 217 (1968).

Sufficiency of identification is a question of fact, and the determination of the judge or jury will not be reversed on review unless the testimony is so unsatisfactory as to leave a reasonable doubt as to the guilt of the accused. The People v. Brengettsy, 25 Ill. 2d 228, 231 (1962); People v. Moscatello, 114 Ill. App. 2d 16 (1969). Here it was for the court to weigh the testimony and to determine the credibility of the witnesses. The People v. Woods, 26 Ill. 2d 582, 585 (1963). The fact that some persons present failed to identify the accused does not require a reversal. The People v. Perkins, 17 Ill. 2d 493, 499 (1959); The People v. Macias, supra, at page 217.

Defendants have cited a number of cases in which convictions have been reversed for inadequate identification testimony. (E.G. The People v. McGee, 21 Ill. 2d 440 (1961); The People v. Cullotta, 32 Ill. 2d 502 (1965); People v. Betts, 101 Ill. App. 2d 322

(1968); The People v. Gardner, 35 Ill. 2d 564 (1966)), but each involve vague and doubtful identification testimony and each is totally distinguishable from the facts in the case at bar.

Defendant Miller was positively identified by Thomas Clegg, Linda Anderson and Dorothy Burk, each of whom had sufficient opportunity to view this defendant on November 11th, 1968. The minor discrepancies in the testimony, the absence of a line-up, and the absence of a previous request by the police to have these witnesses identify the defendants, are all factors which direct themselves to the questions of the weight and credibility of their testimony and were for the judge to determine.

Defendant Circelli was also positively identified by Thomas Clegg and Linda Anderson. In addition, he was also positively identified by Bruce Hedmark and Frank Acton, who had attended a line-up (but each of whom testified they were able to identify this defendant in court without reference to the line-up). Under these circumstances, defendant Circelli's argument that the in-court identification was a result of a potentially suggestive line-up, is not persuasive, particularly when no proof of any suggestive circumstance is found in the record. See The People v. Nelson, 40 Ill. 2d 146, 151 (1968); and The People v. Speck, 41 Ill. 2d 177, 193 (1968). Under this record, defendants' citation of such cases as United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967) does not support their contentions.

Defendants also cite Stovall v. Denno, 388 U.S. 293 (1967) without particular comment. In view of the complete absence in the record of any claim of the deprivation of Stovall right to counsel and the absence of any motion to suppress the testimony at the trial, the case is governed by the rule that a defendant must prove that a confrontation was so unnecessarily suggestive and conducive to mistaken identification as to amount to denial of due process

of law (Stovall, at page 301, 2; The People v. Speck, supra, at page 193; The People v. Nelson, supra, at page 150, 151). Also, there is no merit to defendants further suggestion that the presence of the two defendants at the counsel table was itself suggestive and tainted the identification, in the absence of any circumstances in the courtroom procedure supporting the claim.

Defendants argue further that the court erred in allowing evidence relating to the fingerprints, both in the Bigley car and those found in the Gunderson home.

Miller urges that the presence of his fingerprints in Stephen Bigley's car was not a relevant circumstance in view of his testimony that he had been in the car the day previous to the burglary because Bigley had helped him move to his new apartment. This argument goes to the weight of the testimony and not to its admissibility. People v. DiVito, 66 Ill. App. 2d 282 (1966), cited by defendants, and the authorities in that opinion, are not in conflict in that they do not deny the admission of the fingerprint evidence but state that such evidence, when explained, may not alone warrant a conviction. Here the evidence was corroborative of the identification testimony and was further supported by the corroborating circumstances of the meeting of Bigley, Circelli and Miller in the Miller apartment a few hours after the burglary.

The argument is also made that the fingerprints of Bigley in the Gunderson home should not have been admitted. There was no error in the admission of this evidence since Bigley's car was placed at the scene before the burglary, three males were viewed in the car, the car was abandoned after the arrival of the police on the scene, and Bigley, Miller and Circelli later met at Miller's apartment. The weight to be given this evidence and the reasonable inferences which might be drawn from it were for the court to determine.

The argument is further made that the identification and fingerprint testimony should not have prevailed over the evidence of alibi in Miller's case and the exculpatory testimony accounting for his presence at the scene in Circelli's case. In view of the ample identification evidence and the corroborating circumstances, the court was not required to believe the alibi testimony even though otherwise not contradicted. The People v. Setzke, 22 Ill. 2d 582, 586 (1961); The People v. Soukup, 41 Ill. 2d 94, 97 (1968); People v. Habdas, 94 Ill. App. 2d 330, 339 (1968).

Counsel for defendant Circelli has argued that a reasonable doubt has been created in that he concludes from the record that "at least five subjects were viewed on the day in question at or near the Gunderson home", rather than the three who were indicted. He suggests that the placing of three persons in the car prior to the burglary was suggestive and influenced the identifications made by the witnesses. We are unable to reach that conclusion after reading the entire record. There was a chase, there was doubling back, there were different pursuers and different pursued at intervals of time and at different places, but this did not make the identifications, in our opinion, vague or doubtful.

We conclude that both defendants had a fair trial and were found guilty on proper evidence.

We also find that the trial court did not abuse its discretion in denying probation to the defendant Circelli. The defendant has cited no authority nor has he pointed out any facts in the record to support his argument. He points merely to a statement of the court after a hearing in aggravation and mitigation and including the consideration of a pre-sentence report, that "the evidence in this case was so overwhelming that I don't believe this is a case that merits probation". We would agree that the fact that there

is a clear finding of guilt may not, in itself, be a ground for denying probation. However, the denial of probation here was after a full hearing in which the court substantially complied with the statutory procedure and was not only informed of the character of the offense but with that of the offender. Under these circumstances defendant has not sustained his burden of showing that the trial court's decision was purely arbitrary. The People v. Molz, 415 Ill. 183, 189-191 (1953); The People v. Woods, 23 Ill. 2d 471, 475 (1961); and The People v. Hamby, 6 Ill. 2d 559, 566, 567 (1955).

The judgment below is affirmed.

AFFIRMED.

ABRAHAMSON, J. and MORAN, J. concur.

122 I.A.^{2} 191

(24540—4M—9-70) 160-o 2

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN Presiding Judge
HONORABLE SAMUEL O. SMITH, Judge
HONORABLE HAROLD F. TRAPP, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 28th day of APRIL A. D. 1970, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 11122

Agenda No. 69-97

People of the State of Illinois,
Plaintiff-Appellee
vs.
Robert Newby,
Defendant-Appellant

Appeal from
Circuit Court
Macoupin County

CRAVEN, P.J., delivered the opinion of the court.

The defendant was convicted, in a jury trial, of aggravated battery and sentenced to the Illinois State Penitentiary for a term of not less than one nor more than five years. He appeals.

The defendant contends that a statement given by him to the sheriff, the State's Attorney, and an office clerk of the sheriff's office was not voluntary; that the statement was taken after a misrepresentation as to his constitutional rights and was, therefore, improperly admitted into evidence as a confession of his guilt. It is further asserted that it was improper for the trial court to permit the State's Attorney to appear as a witness in connection with the admission of the statement. In

addition, complaint is made as to certain evidentiary rulings.

The facts may be briefly stated for purposes of an examination into these contentions. The defendant, Robert Newby, was having what is described as a "love affair" with the wife of his cousin, Tom Newby. This affair commenced in December of 1967. Sometime around Christmas of 1967, the defendant, either alone or in concert with Tom Newby's wife Faye, determined that Tom Newby could be frightened into leaving his home if he were shot at and that, following this, Faye would be free to marry the defendant. According to the testimony of Faye, the defendant related how he could get a gun, frighten Tom, dispose of the gun, and then marry her.

On March 14, 1968, Tom Newby was shot in the back with a shotgun. On March 15, 1968, one Ralph Knudson found a .410-gauge shotgun in a ditch on the right-hand side of a road west of Plainview. The gun was turned over to Carlinville, Illinois, police who in turn, turned it over to the sheriff.

On March 21, 1968, the defendant appeared at the sheriff's office, According to the sheriff the defendant came in, inquired if the gun had been found, and when he was informed that it had been and that the sheriff knew of the affair with Faye the defendant agreed to make a statement stating that, "they are going to catch me anyway, I would like to tell you about this." According to the defendant, he appeared at the sheriff's office

[illegible]

[illegible]

[illegible]

[illegible]

in response to a request that he take a lie-detector test. Thereafter the defendant made a statement consisting of some seven pages. The statement was reduced to writing in longhand by a clerk of the sheriff's office. The defendant signed the statement on each of its seven pages and on the first page further signed below a printed recitation that it was a voluntary statement made after he had been admonished as to his rights to remain silent, to have an attorney, etc. The State's Attorney, the sheriff and the clerk from the sheriff's office all signed the statement as witnesses.

The statement related the affair with Faye Newby, the fact that they had discussed getting married; a conversation with reference to frightening Tom; how the defendant purchased a gun and shells, what he paid for the gun, how he transported it; and how on the night of March 14 he parked his car some two hundred yards from the residence of Tom Newby, got out, waited until Tom Newby left his house, fired one shot at him, ran to his car, and threw the gun and the shells out of the car on a road a short distance from Plainview. The gun and shells were found where the defendant stated he had thrown them. The statement further recited that the defendant knew the gun had been found and he decided the sheriff would find his fingerprints on the gun so he might as well tell the sheriff about it.

The trial court conducted a thorough hearing out of the presence of the jury on the question of the voluntariness and

admissibility of the statement. The defendant and the three witnesses to the statement all testified. The defendant asserts the statement to have been involuntary. The witnesses to the statement each testified that he was fully admonished as to his rights as if he were under arrest and described in detail the taking of the statement including its voluntary character. The trial court admitted the statement into evidence. We agree. In this court the defendant seems to be contending that the statement should not have been admitted inasmuch as at the time of its taking he was not under arrest. Yet, the form for the statement describes it as a voluntary statement (under arrest). The defendant relies upon Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

There is little controversy but that the defendant was fully admonished as to all of his rights in compliance with the requirements of Miranda. Having been thus admonished, it seems immaterial that he was not in fact in custody or under arrest. Miranda and the many cases interpreting it relate only to in-custodial interrogation. A voluntary statement such as is established by this record, not gained as a result of in-custodial interrogation, is not affected by Miranda.

The State's Attorney testified over objection by the defendant in connection with the admissibility of the statement. This does not mandate a reversal. The trial court is vested with

discretion in permitting a witness to testify and may permit the prosecuting attorney to testify even though the practice is not approved except where the ends of justice require it. See People v. Knox, 90 Ill. App. 2d 149, 234 N.E.2d 128 (1st Dist. 1967), and cases there cited. It is clear that courts do not look with favor upon the introduction of testimony of a prosecuting attorney by either the State or the defense. See Annot., 149 A.L.R. 1305. The propriety of allowing such testimony is a matter largely within the discretion of the trial court. We do not condone the practice in any general sense, but on the basis of the facts in this case we cannot say that the trial court abused its discretion so as to warrant a retrial.

Finally, the defendant asserts that the trial court was in error when it permitted the gun and the shells to be introduced into evidence, having admitted the statement. The gun and the shells described therein were found in accordance with the statement's recitation as to their location. The trial court was correct. The judgment of the Circuit Court of Macoupin County is affirmed.

Affirmed.

SMITH and TRAPP, JJ., concur.

122 p.304

122 I.A.2 304

69-72

PEOPLE VS. EUGENE A. YOUNG

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

OTTAWA

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the Year of our Lord one thousand nine hundred and seventy, within and for the Third District of Illinois:

Present—

HONORABLE HOWARD C. RYAN, Presiding Justice

HONORABLE ALLAN L. STOUDER, Justice

HONORABLE JAY J. ALLOY, Justice

JOHN E. HALL, Clerk

Wayne J. Hess, Sheriff

BE IT REMEMBERED, that afterwards on May 8, 1970 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

No. 69-72

122 I.A.2 304

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1970.

CITY OF KANKAKEE, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Kankakee - Magistrate Division
vs.	)	
EUGENE A. YOUNG, Defendant-Appellant.	)	Honorable Patrick Burns Judge Presiding

---

ALLOY, J.

Abstract

Eugene A. Young, defendant, appealed to this Court from orders and judgments of the Magistrate Division of the Circuit Court of Kankakee County, Illinois, where defendant was ordered to pay fines for alleged violations of certain local ordinances (following the ticketing of the wife of the defendant for violation of a traffic regulation). The appellee, City of Kankakee, has failed to appear or file a brief in this cause and this Court is, therefore, justified in reversing the judgment without further discussion (VILLAGE OF MOUNT PROSPECT v. MALOUF, 103 Ill. App. 2d 88, 89; DALEY v. RICHARDSON, 103 Ill. App. 2d 383, 385). In the VILLAGE OF MOUNT PROSPECT v. MALOUF case, supra, we determined not to reverse without further discussion because of the great importance of matters involved in that case. In the cause before us, however, we feel that no important principles or questions of law are involved. As a consequence, this cause is reversed and the orders and judgments of the Magistrate Division of the Circuit Court of Kankakee County, wherein defendant was ordered to pay certain fines, from which he has appealed to this Court are herewith expressly vacated.

Reversed and Judgments Vacated.

Ryan, P. J. and Stouder, J. concur.

122 p. 316 B 2

122 I.A.2 316

ABST.

69-50

JOHN WAYNE EIKER VS. ROSS E. RAGON

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

OTTAWA

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the Year of our Lord one thousand nine hundred and sixty-nine, within and for the Third District of Illinois.

Present—

HONORABLE ALLAN L. STOUDER, Presiding Justice

HONORABLE JAY J. ALLOY, Justice

HONORABLE HOWARD C. RYAN, Justice

JOHN E. HALL, Clerk

FLOYD L. CONKLING, Sheriff

BE IT REMEMBERED, that afterwards on May 15, 1970 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Case No. 69-50

FILED
MAY 15 1970
JOHN E. HALL
THIRD DISTRICT
APPELLATE COURT CLERK

In The

APPELLATE COURT OF ILLINOIS

Third District

A.D. 1970

122 I.A.^{2} 316

JOHN WAYE EIKER, a minor by CHARLES L. EIKER, his father and next friend,
Plaintiff-Appellant,

vs.

ROSS E. RAGON, and MELVIN B. BROCK,
Defendants-Appellees.

Appeal from the
Ninth Judicial Circuit,
Fulton County.

The Honorable Keith Scott
The Honorable Albert Scot
Presiding.

STOUDER, J. P.

Abstract

By his next friend Plaintiff-Appellant, John Eiker, a minor, under the age of seven years, brought this action in the Circuit Court of Fulton County seeking damages on account of the negligence of the Defendants-Appellees Ross Ragon and Melvin Brock. Plaintiff was the occupant of the car in which the defendant Ragon was the driver. Pursuant to defendant's motion the trial court dismissed the complaint because of its failure to allege willful and wanton misconduct as required by Chap. $95\frac{1}{2}$, Sec. 9-201, Illinois Revised Statutes 1965, commonly known as the Guest Passenger Statute.

Since this appeal was filed Rosenbaum v. Raskin, ____Ill. 2d_____ (consolidated with Ragon v. Ragon) was decided and the Court has held that Chap. $95\frac{1}{2}$, Sec. 9-201, Ill. Rev. Stat. 1967 is inapplicable to minors under the age of seven years. The Rosenbaum case is dispositive of the only issue raised in this appeal and accordingly We conclude that the complaint was improperly dismissed.

For the foregoing reasons the judgment of the Circuit Court of Fulton County is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED

Ryan, .J. and
Alloy, J. concur.

122 I.A.^{2} 341

ABST.

(24540—4M—9-70) 160-o 2

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge
HONORABLE SAMUEL O. SMITH, Judge
HONORABLE HAROLD F. TRAPP, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 18th day of MAY A. D. 1970, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

Abstrac

122 I.A.^{2} 341

ABST.

FILED
MAY 18 1970
Robert L. Conn, CLERK
APPELLATE COURT 4TH DISTRICT

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 11126

Agenda No. 70-7

Thelma Hudspeth,
Plaintiff-Appellee
vs.
James L. Hudspeth,
Defendant-Appellant

Appeal from
Circuit Court
Logan County

CRAVEN, P.J., delivered the opinion of the court.

This divorce action resulted in a divorce to the wife on the grounds of physical cruelty and a detailed decree providing for periodic alimony, attorney fees and possession of a home to the wife. On this appeal no issue is raised as to the propriety of the action of the trial court in granting the divorce. Rather, the sole issue presented by the appeal relates to the alimony and other details of the decree as to the financial affairs of the parties.

The plaintiff and defendant were first married in 1933. Three children born of the marriage were, at the time of the 1969 divorce, living away from home. In 1963 the parties were divorced and remarried. In December of 1968 the

plaintiff filed her complaint for divorce and a decree of divorce was entered in January of 1969. By the terms of that decree the plaintiff was awarded the household furniture and appliances and the right to possession of the marital home at Lincoln, Illinois, which the parties had acquired as joint tenants in 1965 for a purchase price of $10,500 and which was currently encumbered by a mortgage in the amount of $8,638. The down payment of $1500 on the house was represented by a bank note, still due and owing, in the amount of some $1,000. The balance of $500 for the down payment came from the defendant's funds.

The plaintiff was also awarded $50 per month as periodic alimony. An automobile, which was titled in her name, was awarded to the plaintiff. Another car, upon which there was a substantial indebtedness, was awarded to the husband. The trial court, by its decree, took note of and allocated to the parties certain enumerated indebtednesses. By the terms of the decree the wife was given possession of the marital home but ordered to make the mortgage payments of $80 a month, and the decree further provided that if at any time she should abandon the house the property would be sold and the net proceeds thereof divided equally between the plaintiff and the defendant. The court further provided an award of attorney fees in the amount of $200.

The defendant is employed at Lincoln Container Corporation and in 1968 had "take home" pay just under $5,000. The plaintiff is employed at a store in Lincoln, Illinois, and her earnings in 1968 were some $3,100.

On this appeal the defendant asserts that the allowance of $50 monthly alimony was improvidently granted under circumstances amounting to an abuse of discretion, further that the award of possession of the marital home amounts to alimony in gross and should therefore be in lieu of other alimony, and further that the allowance of $200 attorney fees also constituted an abuse of discretion.

Both parties agree that the trial court may make such orders with reference to alimony and attorney fees as shall be fitting, reasonable and just. As to the alimony aspect of the decree, the purpose of allowance is to furnish support to the wife or to contribute to her partial support, and the object and purpose is not to visit punishment on the offending husband. The facts in this case presented a difficult problem to the trial judge. The parties had inflicted upon themselves considerable indebtedness and thereby anticipated future wage income, and obligated themselves to payments, leaving little, if any, cushion for any unexpected contingencies. It is true that in considering the amount of allowance of alimony where the husband and wife both are in receipt of income, the income of each must be taken into consideration. Cahill v.

Cahill, 316 Ill. App. 324, 45 N.E.2d 69 (1st Dist. 1942). Likewise, in determining the husband's ability to pay, his indebtedness should be considered. Young v. Young, 323 Ill. 608, 154 N.E. 405 (1926). However, there is no obligation upon the wife to seek or keep employment so as to terminate the husband's obligation to support or to reduce his alimony payments. Warren v. Warren, 40 Ill. App. 2d 286, 189 N.E.2d 401 (1st Dist. 1963).

The required payment in this case of $50 per month as alimony must be examined in the light of the further provision of the decree that the wife is to pay monthly mortgage payments of $80. In the event the conditions set forth in the decree come to pass and there is an ultimate sale of the home, any increase in the equity by reason of those payments would inure to the benefit of both parties. Under such circumstances we cannot say that the award of $50 per month as alimony constitutes an abuse of discretion. See Auerbach v. Auerbach, 36 Ill. App. 2d 122, 183 N.E.2d 188 (1st Dist. 1962). Turning next to the contention of the appellant that the award of possession of the marital home constitutes alimony in gross and that such an award precludes "ordinary alimony" or "periodic alimony", we find no merit in such contention. This decree does not purport to be, nor is it in effect, an award of lump-sum alimony or alimony in gross. Rather, it is a provision for a place to live for the wife and imposes upon

her an obligation to make monthly payments. Such provision cannot be said to be a conclusive determination of the property rights of the parties. See In re Schwarz' Estate, 76 Ill. App. 2d 114, 220 N.E.2d 889 (4th Dist. 1966); Whitney v. Whitney, 15 Ill. App. 2d 425, 146 N.E.2d 800 (1st Dist. 1958); Katauskas v. Katauskas, 67 Ill. App. 2d 33, 213 N.E.2d 420 (4th Dist. 1966).

Finally, as to the contention that the trial court improvidently awarded $200 attorney fees, we note and agree with the rationale of the trial court that this amount is substantially less than the usual and customary minimum fee awarded even in a default-divorce proceeding. This case clearly involved more preparation, work and court appearances than a default-divorce case and such an award is justified, is not unreasonable nor unwarranted. We find nothing in such an award that would constitute an abuse of discretion.

The sum total of the financial burdens cast upon the defendant in this case clearly indicates, as he asserts, substantial difficulty in meeting his obligations, his current living expenses and compliance with the terms of the decree. This is true whether the defendant's economic plight is measured by current income versus current expenses or net worth. It does not follow, however, that either this court or the trial court must determine in such circumstance that the

defendant's prior indebtedness relieves him of the duty to support his wife or to partially pay attorney fees necessitated by his marital misconduct. The efforts of the trial court to resolve the conflicts and provide a reasonable solution were just, reasonable and in no way an abuse of discretion. The decree of the Circuit Court of Logan County is affirmed.

Affirmed.

SMITH and TRAPP, JJ., concur.

vs.) COURT OF COOK COUNTY.
)
JIMMY WALKER (Impleaded),) Hon. Francis T. Delaney,
) Presiding.
Defendant-Appellant.)

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

On April 23, 1968, Jimmy Walker, having entered a plea of guilty to a charge of robbery, was admitted to probation for a period of twenty-four months. A condition of that probation was that defendant not violate any criminal statute of this State during the period of probation. On October 8, 1968, he was convicted of the offense of aggravated assault and sentenced to a term of one year at Vandalia. Thereafter, a rule issued to show cause why the probation to which he had been admitted should not be terminated. After a hearing at which defendant was present and represented by counsel and at which evidence was taken, the probation to which defendant had been admitted was terminated and defendant was sentenced to a term of two to three years in the Illinois State Penitentiary on the original robbery conviction. This appeal is from the revocation of probation.

The public defender, appointed by the court below to represent the defendant in the prosecution of the instant appeal, has filed a petition for leave to withdraw pursuant to his determination and belief that there exists in the record no arguable issue upon which an appeal might be founded. Pursuant to the Supreme Court ruling in Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), the public defender has also filed a brief raising the one issue which he believes might conceivably support an appeal; that the defendant was denied procedural due process on the hearing which resulted in the termination of his probation.

From the issue raised by the public defender and our own independent review and examination of the entire record, we find nothing arguable on the merits and conclude that an appeal would be wholly frivolous.

Illinois Revised Statutes (1967), Chapter 38, section 117-3 and the cases decided thereunder, of which People v. Price, 24 Ill. App. 2d 364, 164 N.E. 2d 528 (1960) has long been regarded as leading, have established guidelines of procedure to be followed in proceedings for revocation of probation. The defendant must be notified of the alleged violations of his probation and be given an opportunity to defend against and refute the alleged violations. Defendant is entitled to the assistance of counsel. The burden of proof is upon the State to show by a preponderance of evidence the violations of probation charged. Finally, a conscientious judicial determination of the issue must be made.

Here the record clearly reveals defendant to have been advised of the alleged violations of his probation, his presence at the hearing with counsel where he was afforded an opportunity to meet the charges made, and evidence sufficient to establish the violations charged. In view of the record, it cannot be said that the determination by the court below that a condition of probation had been violated was arbitrary or otherwise unsupported by the record.

The petition of defense counsel for leave to withdraw is granted and the judgment of the court terminating probation and sentencing defendant on the robbery conviction is affirmed.

JUDGMENT AFFIRMED.

MC CORMICK, P.J. and BURKE, J., concur.

122 I.A.^{2} 484

(24540—4M—9-70) 160-o 2

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE HAROLD F. TRAPP, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 21st day of MAY A. D. 19 70, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

Abstract

122 I.A.2 484

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 11089-
11147 Consolidated

Agenda No. 69-101

H. Lee Hopwood,
Plaintiff-Appellant
vs.
Patricia E. Hopwood,
Defendant-Appellee
CONSOLIDATED WITH
H. Lee Hopwood,
Plaintiff-Appellant
vs.
Patricia E. Hopwood, a/k/a
Patricia E. Kern,
Defendant-Appellee

Appeal from
Circuit Court
Sangamon County

TRAPP, J.

This appeal presents issues upon a finding of contempt, modification of the custody of a son and the award of attorney's fees to the wife in the sum of $1000.00, incident to the several proceedings. An appeal from an order awarding $1500.00 for the defense of the husband's appeal of the proceedings is consolidated with the original appeal.

The parties were married in 1952 and divorced in 1962,

for the fault of the wife. Custody of sons born in 1953 and 1955 were awarded to the husband subject to the wife's "right of reasonable visitation". Each of the parties thereafter remarried and the wife resided in Tennessee with her second husband.

While the wife resided in Tennessee she came to Springfield for several days each year and visited with the sons during the day. In 1966 she returned to Illinois. This extended litigation originates in the husband's conclusion that the wife's visitation would be limited or restricted as it was during the period that she resided out of the state. He considered that a visit during the day once every two months was proper. He insisted that the boys not be taken to the home of the wife or meet her present husband.

Under such conditions the wife filed a petition in June, 1966, asking that she have visitation rights with the children on one weekend each month and for weekly periods consistent with vacations from school. At the hearing upon such petition the husband appeared <u>pro se</u>. He now says that he was advised that he did not need an attorney at such hearing and complains of the order entered defining the wife's visitations substantially as prayed. Upon this occasion the court stated from the bench that it was not reasonable to insist that the wife see the children under the husband's supervision and under conditions determined solely by him.

This order was the origin for the subsequent contempt proceedings at issue. It is now argued that there was no change of condition which justified such a definition of visitation rights. We find it reasonable to conclude that the wife's limited visita-

tion during the years that she resided in Tennessee did not establish a rigid pattern which in itself became a definition of reasonable visitation. This is true despite the assertation that such former pattern was eminently satisfactory to the husband.

The wife obtained a rule to show cause on December 14, 1966. On December 22nd, the husband filed a petition to modify the terms of the order fixing visitations, asserting that there was no change of circumstances which authorized such order defining visitation.

The evidence upon the issue of contempt shows that upon the weekend for visitation in September, 1966, the wife sent her present husband to pick up the boys and return them to her home. This was done without prior notice to the plaintiff husband by the wife. The latter was then aware that the plaintiff and the sons had expressed a strong dislike for her emissary. The decree did not specifically authorize the wife to send an agent for the boys. If the husband's refusal to deliver the children over upon this occasion was the only evidence upon the issue we could find no willful contempt. The evidence is that the wife did not, during the subsequent months of October and November, request or otherwise arrange for the weekend visitation provided. It is urged that there can be no contempt under such circumstance. The testimony of the wife is that she did not request visitation for such months for the reason that the husband had advised upon one or more occasions that he would not permit visitation as provided in the decree, but that she must come to see the boys at his home in Springfield as she did prior to the decree defining times and places of visitation. Such testimony is not contradicted in the

record. Such testimony, if accepted by the court, supports a finding of denial of the right of visitation.

By order of June 5, 1967, the husband was found guilty of contempt and sentenced to seven days in jail with his sentence stayed for 30 days to permit appeal. Denying the husband's petition for modification of the order defining visitation, the trial court, upon the same date, entered an order providing visitation at times and places in much greater detail than that then in effect. Attorney's fees in the sum of $750.00 were awarded to the wife.

On June 30, 1967, the husband filed a petition for reconsideration of the order finding him in contempt. Rather than take an appeal, he alleged that the award of attorney's fees to the wife in such proceeding was not supported by the law and the evidence, and that the payment of the wife's attorney fees in such amount would interfere with, or perhaps prevent, arrangements for the son, Paul, to attend Culver Military Academy.

While such petition was pending, the wife, on February 28, 1968, filed a petition for modification of the decree upon the issue of custody of the son, Paul. It was alleged that in June, 1967, the husband had brought the sons to the wife's home for a period of some two weeks for his own convenience. It was further alleged that the son, Paul, had continued to remain with the wife and had expressed a desire that he continue to do so. This petition asked that the custody of the son be changed from the husband to the wife and that a reasonable sum for his support be fixed, together with attorney's fees for such modification. The husband's answer admitted such arrangements were made and con-

tinued, but asked that the prayer of the wife's petition be denied.

On April 26, 1968, hearing was held upon the husband's petition for reconsideration of the order finding him in contempt, and the wife's petition for modification of custody. An order filed on July 3, 1968, found it to be in the best interests of the son, Paul, that he be placed in the custody of the wife and that the sum of $20.00 per week support be paid by the husband. The custody of the second son was left with the husband, and each party was to have reasonable visitation with the son in the custody of the other. The court awarded the sum of $250.00 as attorney's fees in the matter of these proceedings.

The issue of contempt reaches us in a peculiar condition. At the conclusion of the hearing in April, 1968, upon the husband's motion for reconsideration, the court said from the bench:

> "....the order sending the respondent to jail for seven days is hereby reversed...."

This is consistent with the court's prior statement that the husband's petition for reconsideration was "allowed in part and denied in part". The written order of July 3rd, however, provides that the jail sentence be vacated, but that consideration of the punishment for willful contempt be "reserved". Nothing in this record explains the variance between the court's ruling from the bench and the written order in the record.

Contempt is frequently described as a summary procedure. We have searched at length but have found neither text nor opinion which authorizes the indefinite reservation of sentence in fixing the punishment for civil contempt. Civil contempt is coercive and is designed to bring about compliance with the order of the

court. Since it is apparent that the order which purports to reserve punishment for contempt includes such modification of the order shown to have been violated that compliance therewith is no longer an issue, the provision of the order purporting to reserve punishment is an improper order.

The propriety of the decree awarding the custody of the son, Paul, to the wife is challenged with the citation of Szczawinski v. Szczawinski, 37 Ill. App. 2d 350; 185 N.E. 2d 375. It holds that a condition precedent to modification of custody is a showing of a change of condition since the initial decree and of the best interests of the child. The record supports the conclusion that both conditions are met in this case. Following the order of June, 1967, the husband requested the wife to keep the children, and by agreement of the parties the son, Paul, continued to reside with the wife and his personal belongings were moved to her home. Thereafter, Paul, who was approaching the age of 14, expressed a desire to continue to live with his mother and so advised the court at the hearing immediately prior to the order changing custody. Such fact is a proper consideration in determining custody. Barbara v. Barbara, 110 Ill. App. 2d 189; 249 N.E. 2d 269. The record shows that the parties had discussed the adoption of Paul by the wife and her present husband. This plan appears to have failed upon the issue of who would pay the costs of such proceeding. The husband testified that Paul continued to reside with his mother because of an expressed desire to do so, and to avoid the problems involved in visitation. Such record supports a conclusion of a change of circumstance for the

best interests of the son. Laughlin v. Laughlin, 97 Ill. App.2d 480; 240 N. E.2d 323. In his testimony the husband agreed that problems might arise as the boy continued to reside with his mother, but legal custody remained with the father. In matters concerning the custody of minor children, a reviewing court will not disturb the determination of the trial judge who has heard the evidence and has had an opportunity to observe the parties unless it appears that manifest injustice has been done. Hahn v. Hahn, 69 Ill. App.2d 302; 216 N. E.2d 229, Carstens v. Carstens, 108 Ill. App.2d 439; 248 N. E.2d 135 and Jenkins v. Jenkins, 81 Ill. App.2d 67; 225 N. E.2d 698.

It is argued that it was error to award the sum of $20.00 per week to be paid by the husband as support and it is urged that the wife is legally obligated to support minor children. The cited Girls Latin School of Chicago v. Hart, 317 Ill. App. 382; 46 N. E.2d 118, is a contract action against the mother who placed the child in the school. The record shows that the husband's objection to the award of support does not arise from a deficiency of ability to pay, but rather from a pervading notion that he should not contribute support if Paul does not live with him. He, in fact, pleaded proposed expenditures of considerably greater sums for private schooling as a grounds for denying an award of attorney's fees to the wife. From this record it is not unreasonable to conclude that the amount of support awarded will pay approximately one-half of the total required for the care of Paul who is about to enter high school.

The husband urges that the modification of custody was for the convenience of the wife and that it was error to allow

attorney's fees to the latter upon such modification. The facts here do not come within the rule of Moore v. Black, 10 Ill. App.2d 339; 134 N. E.2d 347, which is cited. There the wife had petitioned for authority to take the children in her custody from the State. The opinion emphasizes that the husband had done nothing to interfere or object to such proceeding. The facts here are comparable to Mabbatt v. Mabbatt, 78 Ill. App.2d 455; 223 N. E.2d 191, where the husband permitted and agreed to a *de facto* change of custody which he subsequently undertook to reverse. As said in that opinion, allowance of attorney's fees depends upon the circumstances of the particular case and not upon who initiates the proceeding.

The husband asserts error in the award of $1500.00, as attorney's fees so that the wife might defend this appeal. It appears to be argued that this is not a divorce proceeding within Ch. 40, §16, Ill. Rev. Stat. 1967, which authorizes the awarding of attorney's fees. The husband cites Kohler v. Kohler, 326 Ill. App. 105; 61 N. E.2d 687. That case concerned an action in equity seeking reformation of a contract of property settlement which included provisions for support of minor children. That opinion points out that the circuit court had continued jurisdiction of the divorce and custody proceedings, but that the action at issue was entirely independent and separate from such proceedings so that it did not come within the provisions of the Divorce Act.

The wife found it necessary to employ counsel to enforce her rights under the divorce decree and under such circumstances she is entitled to the award of a reasonable attorney's

fees. Gregory v. Gregory, 52 Ill. App.2d 262; 202 N. E.2d 139; Gaines v. Gaines, 106 Ill. App.2d 9; 245 N. E.2d 574.

As in Mabbatt, the record supports the conclusion that the attorney's fees awarded to the wife were required under circumstances created by the husband, i.e., his continued attempts to limit the wife's visitation which required orders of defining visitation from the court, his attempt to procure the modification of such orders when the wife sought to enforce the terms of the order and the joining in arrangements creating circumstances which authorized a change of custody.

The orders below are affirmed.

AFFIRMED.

CRAVEN, P.J. and SMITH, J., concur.